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In the

Supreme Court of the United States

October Term, 1941.

No. 533.

STANDARD OIL COMPANY OF LOUISIANA,
Appellant.

vs.

STATE OF TENNESSEE, Ex Rel. GEORGE F. McCANLESS, Commissioner, and ROY H. BEELER, Attorney General,
Appellees.

PETITION FOR REHEARING.

T. M. MILLING,
WILLIAM WALLER,
J. PASCHALL DAVIS,
Counsel for Appellant, Standard Oil Company of Louisiana.

Of Counsel:
ARMISTEAD, WALLER, DAVIS & LANSDEN.

BAIRD-WARD—NASHVILLE

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PETITION FOR REHEARING.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Standard Oil Company of Louisiana, the appellant in this cause, respectfully prays that this Honorable Court grant a rehearing of the above entitled cause and, in support of this petition, respectfully shows:

1. *The Question Here Presented was not Passed Upon in the Per Curiam Order of October 13, 1941.*

The *per curiam* order of this Court affirming the judgment below is copied in the margin.*

In the brief filed by the State of Tennessee in support of its motion to dismiss the appeal for want of a substantial federal question, counsel for the State insisted merely upon the correctness of the decision of the Supreme Court of Tennessee on the issue of the taxable situs of the petroleum products here involved. Appellant's short reply brief opposing the motion to dismiss the appeal was devoted to a discussion of the issue which the State had tendered in its motion and supporting brief. We did not and do not, however, regard that issue as the more important question in the case. Our failure to file a brief on the more important and ultimate issue in the case was the result of a misunderstanding of the Court's practice and a belief that we would thereafter be afforded an opportunity to brief this question and argue it orally before the Court.

The four cases cited in the *per curiam* order of this Court turned on the issue of the validity of State *ad valorem* taxes.* The exaction of four-tenths of a cent per gallon involved here is not, however, an *ad valorem* tax on petroleum products, but an excise tax, except for the small portion which represents a charge for the cost of inspection. *State of Tenn.* v. *Nashville, C. & St. L. R.R.* (1940), 176 Tenn., 15, 137 S. W. (2d), 297. We believe that we may have failed to emphasize before this Court our basic con-

*"Per Curiam: The judgment is affirmed. *General Oil Co.* v. *Crain*, 209 U. S., 211; *Bacon* v. *Illinois*, 227 U. S., 504; *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S., 665; *Minnesota* v. *Blasius*, 290 U. S., 1, 10-12." (Entered October 13, 1941.)

*Although *General Oil Co.* v. *Crain*, 209 U. S., 211, involved an inspection fee, the majority of the Court, in deciding against the taxpayer, accepted at face value the taxpayer's contention that the principles applicable to *ad valorem* taxes were controlling.

tention that the taxes involved in this case are not on property but on interstate trade itself. In the words of Professor Thomas Reed Powell in his article, "New Light on Gross Receipts Taxes—The Berwind-White Case," 53 Harvard Law Review, 909 (April, 1940), at pp. 938-939, these taxes "pounce ounce by ounce and gallon by gallon. We should face these taxes as taxes on trade or we do not face them fairly."

The question now presented was first raised in this cause by an amended and supplemental answer filed by appellant in the trial court shortly after the decision of this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U. S., 33 (Typewritten Record, pp. 193-195). Appellant insisted in the trial court and also in the Supreme Court of Tennessee that the taxable situs of the petroleum products for ordinary property or *ad valorem* taxation was not controlling or determinative, and that even if the products here involved were subject to State taxation of that type, the excise tax here involved, which is measured by the entire gallonage of the products sold and consumed in other states, is invalid because it actually discriminates against interstate commerce and destroys it. The Supreme Court of Tennessee refused "to pioneer" by discussing this question. (Statement as to Jurisdiction, pp. 40-41.) The action of the Supreme Court of Tennessee on this issue was assigned as error in appellant's Assignment of Error No. 2. This particular question is barely outlined at p. 12 of the appellant's separate Statement as to Jurisdiction.

2. *Importance of the Question now Presented.*

Memphis, Tennessee is a Mississippi River port which, with respect to petroleum products manufactured on the Gulf Coast, in Louisiana and elsewhere, may be regarded

as a port of entry for the states of Mississippi and Arkansas, as well as a transshipment port for products which must be transferred to different type barges for continued transportation up the Ohio River to other such ports and further transshipment. As shown by the record, the maintenance of storage tanks at river ports, such as Memphis, is an economic necessity in connection with the importation and exportation of the petroleum products passing through such ports. May the State of Tennessee collect this import duty or toll of four-tenths of a cent per gallon on petroleum products which are not manufactured, sold or consumed in Tennessee but which are temporarily stored there for export to other states?

The imortance of the question presented here is magnified by the fact that new pipelines are to be constructed for the purpose of carrying petroleum products across many states in the interest of national defense and for the future welfare of the nation. At intermediate points along the course of these pipelines it will be necessary to maintain storage tanks, similar in purpose to those involved here. According to the precedent established by the *per curiam* order herein, it would be necessary to undergo the additional and uneconomic cost of establishing and maintaining separate tankage in each separate state of destination; and it would not be feasible to adopt the more efficient and economic method of distribution which would involve the establishment of tankage at a distribution point in one state for the purpose of distributing petroleum products to other neighboring states.

For the reasons already stated, we did not, in our brief in reply to the State's motion to dismiss, discuss the merits of this fundamental and important question. Our reason

for doing so now is that this Court will undoubtedly wish to consider the merits of the question in disposing of this petition for rehearing.

3. *The Effect on Interstate Commerce.*

A tax on the storage of petroleum products for export, measured by volume, is in substance a tax on the sale price or the gross receipts of the petroleum products sold and used in other states. As stated in Professor Powell's article in 53 Harvard Law Review, 909, at p. 911:

> "A tax on the sale of gasoline at the rate of four cents a gallon may be regarded as a tax on the price charged, although the rate varies somewhat according to the price per gallon . . ."

The toll of four-tenths of a cent per gallon involved in this case "would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce." *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U. S., 33, at p. 57. "The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." *Gwin, White & Prince* v. *Henneford* (1939), 305 U. S., 434, at p. 439. "Such a multiplication of state taxes, if measured by the volume of the commerce, would re-establish the barriers to interstate trade which it was the object of the commerce clause to remove." Id. at p. 440.

The Tennessee tax or "inspection fee," as applied to products sold and consumed in Tennessee, is presumably passed

on to the consumer, because all similar products which are sold or used within the State are subject to the same exaction. See *Texas Co.* v. *Brown* (1922), 258 U. S., 466, 479-480. But when the products are exported into other states, such as Arkansas and Mississippi, where they are subject to additional excise taxation, the Tennessee inspection fee must be absorbed by the distributor if the commerce is to continue at all. Cf. *Texas Co.* v. *Brown, supra,* at p. 482. This is a true example of a "tax being used to place interstate commerce at a competitive disadvantage." *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U. S., 33, at p. 45. In other words, not merely a burden upon interstate commerce but a true discrimination against it is present.

The tax involved here is the converse of the tax involved in the *Berwind-White* case. Here the burden of the tax does not fall upon consumers within the taxing state, but upon interstate commerce itself and upon consumers in states other than the taxing state. The fundamental distinction is pointed out by Professor Thomas Reed Powell in his article in 53 Harvard Law Review, 909, at pp. 933-934:

> "A state tax upon all introduction of goods into the state would be indistinguishable from a tariff. Such a tax cannot be imposed on the introduction of goods from abroad. Had not the Supreme Court rejected Marshall's view that goods from sister states are imports within the clause forbidding state taxation thereof, the states could not be permitted to impose a tariff on the entrance of goods from anywhere. The import clause, however, does not save goods from subjection to a general use tax, since imports cease to be imports upon sale or bulk broken. Even sales taxes would

reach many sales of foreign goods for domestic use, for many of them would be second sales or sales of less than the original package. Thus in one way or another all consumption is taxable, whatever the past origin of the thing consumed. If the New York tax is in substance a tax on consumption, only formal objections can be raised against it. It does not enlighten to call it a tariff without ascending to differentiating particulars."

And again (p. 935):

"One consideration which Marshall and later Taney adduced for the protection of goods from abroad does not apply to a tax which, like the New York sales tax, is confined to sales for local use or consumption. New York is not taking toll from trade or consumption in other states. Her own people bear the burden. Her tax does not touch what comes in to go out again."

The following excerpts from Professor Powell's article are of particular interest (pp. 936-937):

"When, if ever, a state imposes a tax on all introduction of goods from sister states or on the use thereof in the sense of full dominion immediately following receipt, a distinction should be drawn. Such a tax would fall on wholesalers and jobbers who receive and store goods awaiting orders from other states. In such cases, to some extent at least, the ultimate burden would fall on customers in other states. . . . Taxes on receipt, purchase, or possession prefatory to sales to other states might to a degree offend against the canon which Mr. Justice Stone refers to as 'the recognized danger that, to the extent that the burden falls on economic interests without the State, it is not likely to

be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.' . . ."

In the case at bar it is clear that if Tennessee may impose an excise tax upon goods distributed from jobbing centers within the State (e. g. Memphis) to neighboring states, one of two results must necessarily follow, depending upon the amount of the tax and the competitive situation in the states where the goods are purchased and consumed: (1) Tennessee will take a toll from the consumers in these other states, or (2) Tennessee jobbers who do business in other states must move their distribution centers from Tennessee into the states where the goods are consumed in order to meet local competition, and must have a distribution center in each state.

The record in the case at bar demonstrates that the established course of interstate commerce in petroleum products from Baton Rouge, Louisiana, through Memphis to other states cannot stand an additional burden of four-tenths of a cent per gallon and will be completely destroyed if that burden is imposed. (Typewritten Record, pp. 50-57, 136-140, Exhibit 10 to Stipulations.) Tennessee will not profit beyond the amount of taxes actually involved (and an additional amount which accrued prior to the Supreme Court of Tennessee's decision), and both appellant and the public will suffer from the uneconomic method of doing business which will have been forced upon appellant and others in like situations.

Although the discrimination against interstate commerce may be subtle, it is nevertheless as effective and substantial as the discrimination stricken down in *Hale* v. *Bimco Trading Co.* (1939), 306 U. S., 375, and *Best & Co.* v. *Maxwell*

(1940), 311 U. S., 454. As stated in the *Best & Company* case, at pp. 455-456:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

While the present tax is ostensibly upon "storage," the history of the Tennessee statutes makes it clear that "storage" is separately taxed only when the products are to be shipped to other states. By Chapter 12 of the Public Acts of 1929, the inspection fee laws of Tennessee were amended so as to cover all petroleum products "stored" within the State. Prior to that time the tax on manufacture, sale or use caught all petroleum products which were stored in Tennessee for sale or use within the State. Therefore, the only effect of adding the word "stored" was to impose a new tax on products stored in the State for export to other states. (No effort was made by the Tennessee taxing authorities until 1936 to apply the new tax to storage for export under the facts of the case at bar.) Insofar as sale or use within the State is concerned, the tax on storage is merely a compensating tax similar to that upheld in *Gregg Dyeing Co.* v. *Query* (1932), 286 U. S., 472. But insofar as storage for export is concerned, the tax is not a compensating tax. And since such a tax cannot be passed on to the consumer (as can the tax on storage for domestic use or sale), it discriminates against storage which is incidental to the importation of petroleum products into Tennessee for export to other states.

For the foregoing reasons, it is respectfully urged that this petition be granted.

Respectfully submitted,
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CERTIFICATE OF COUNSEL.

I, J. Paschall Davis, one of the counsel for the above named appellant, Standard Oil Company of Louisiana, do hereby certify that in my opinion the foregoing petition has merit and that the petition is presented in good faith and not for delay.

J. PASCHALL DAVIS,
Counsel for Appellant, Standard Oil Company of Louisiana.